DISTRICT OF COLUMBIA COURT OF APPEALS

No. 12-AA-973

GUY DURANT, *et al.*, PETITIONERS,

v.

DISTRICT OF COLUMBIA ZONING COMMISSION, RESPONDENT,

and

901 MONROE STREET, LLC, INTERVENOR.

Petition for Review of an Order of the
District of Columbia Zoning Commission
(ZC-10-28)

(Argued April 11, 2013 Decided May 16, 2013)

David W. Brown, with whom *Nicole W. Sitaraman* was on the brief, for petitioners.

Irvin B. Nathan, Attorney General for the District of Columbia, and *Todd S. Kim*, Solicitor General, *Donna M. Murasky*, Deputy Solicitor General, and *James C. McKay, Jr.*, Senior Assistant Attorney General, filed a statement in lieu of brief in support of intervenor.

Paul A. Tummonds, Jr., with whom *Leonard H. Freiman*, and *Jonathan E. Small* were on the brief, for intervenor.

Before FISHER and EASTERLY, *Associate Judges*, and SCHWELB, *Senior Judge*.

SCHWELB, *Senior Judge*: This case arises from a zoning dispute which has sharply divided the residents of a neighborhood in northeast Washington, D.C., near Catholic University. On June 8, 2012, the District of Columbia Zoning Commission issued an order approving the application of 901 Monroe Street LLC (the developer) for a Planned Unit Development (PUD) and a related zoning change. Petitioners, a group of area residents, who are known as the "200-Footers" because they live within 200 feet of the proposed development, have asked this court to review the order, contending that the Commission's approval of the developer's application was inconsistent and, indeed, irreconcilable with the District's Comprehensive Plan.[1] Neither the Commission nor the District's Office of Attorney General has participated in the proceedings before this court, and the Commission's decision is defended by counsel for the developer.

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[1] The Comprehensive Plan, first adopted in 1986 and amended in 2006, establishes a "broad framework intended to guide the future land use planning decisions for the District." *Wis.-Newark Neighborhood Coal. v. District of Columbia Zoning Comm'n*, 33 A.3d 382, 394 (D.C. 2011) (quoting *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 337 (D.C. 1988)) (internal quotation marks omitted). The Plan, among other things, "[d]efine[s] the requirements and aspirations of District residents" and "[g]uide[s] executive and legislative decisions on matters affecting the District and its citizens." D.C. Code § 1-306.01 (b)(1), (2) (2012 Supp.).

The Commission conducted extensive proceedings before reaching its decision, and it issued detailed findings of fact and conclusions of law. Contrary to the petitioners' claim that the Commission failed to act impartially, and although the Commission adopted substantially verbatim a number of the developer's more disputed proposed findings, we are satisfied that the Commission addressed this case with an open mind and considerable care and deliberation, and we are of the opinion that, for the most part, the Commission's findings are supported by substantial evidence on the record as a whole and that its legal analysis is generally sound. We therefore reject as meritless the petitioners' contention that no further proceedings are necessary and that this court should simply reverse the Commission's order and direct that the developer's application be denied. We agree with the petitioners, however, that the Commission failed to make findings on several disputed issues which are identified in Part III of this opinion, and we conclude that these issues are sufficiently significant to require a remand for additional findings of fact and conclusions of law.

I.

The property at issue is an approximately 60,000-square-foot parcel located on the 900 block of Monroe Street, just south of the Brookland/CUA Metro station.

It is bounded by Lawrence Street, N.E., to the south and 9th street, N.E., to the west. Currently, the parcel is home to at least five free-standing residences. The Colonel Brooks' Tavern is also located in the affected areas.

Prior to this application, the property was primarily authorized for residential use. The zoning regulations designated a portion of the property R-2 residential, and another portion C-1 commercial.[2] The Future Land Use Map (FLUM)[3] approved one part of the property for mixed-use moderate-density uses, another part for moderate-density residential uses, and a third part for low-density residential uses. The Generalized Policy Map (GPM)[4] also contemplated low-

[2] Under the District of Columbia Municipal Regulations, R-2 residential zoning consists primarily of "one-family, semi-detached dwellings," while C-1 zoning consists of "neighborhood shopping." 11 DCMR § 105.1 (a)(2), (d)(1) (2011).

[3] The FLUM is an aspect of the District's Comprehensive Plan, and carries the same weight as the Plan's written elements. 10–A DCMR § 225.1 (1994).

[4] Unlike the FLUM, the GPM is not part of the Comprehensive Plan itself. Rather, it is a tool the Commission uses to "guide land use decision-making in conjunction with the Comprehensive Plan text, the Future Land Use Map, and other Comprehensive Plan maps." 10-A DCMR § 223.2 (1994).

density residential use in the area, treating the property as a Neighborhood Conservation Area.[5]

On November 16, 2010, the developer submitted its PUD application to the Zoning Commission. Simultaneously, the developer also asked that the entire parcel be rezoned to C-2-B.[6] In its application, the developer proposed to transform the entire parcel, with the exception of five free-standing homes along 10th Street, into a mixed-use commercial and residential project. The project would include ground-floor commercial space for five to eight tenants, with more than 200 apartment units on the upper floors. The structure itself would reach six stories in height,[7] topping out at sixty feet, eight inches at its highest point, and

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[5] Such areas, according to the GPM, "are primarily residential in character," with "[l]imited development and redevelopment opportunities" that are "small in scale." 10-A DCMR § 223.4, .5.

[6] C-2-B zoning allows for "community business centers" of "medium-high density." 11 DCMR § 105.1 (d)(2)(B).

[7] The FLUM approves portions of the property for moderate-density mixed uses, which "generally do not exceed five stories in height." 10-A DCMR § 225.9. Moreover, the Brookland/CUA Small Area Plan (SAP) provides that development along Monroe Street east of the WMATA tracks – where the property is located – may be allowed "up to a maximum of [fifty] feet [in height] through a Planned Unit Development." To better accommodate these designations, the developer proposed to set back the sixth floor from the building's edge, beginning at the fifty-foot mark.

carry a floor-to-area ratio (FAR)[8] of 3.31.

On March 14, 2011, the Commission held an initial hearing to consider the developer's proposal. At that hearing, the Commission heard testimony in support of the project from the Office of Planning (OP). It also considered OP's initial written report, in which OP concluded that the developer's proposal was not inconsistent with the Comprehensive Plan. In its report, OP indicated that in its view, the developer's proposal struck an appropriate balance between competing Plan policies, some of which encouraged new development around Metro stations, while others favored the preservation of existing neighborhoods.

In spite of OP's endorsement, some members of the Commission harbored lingering concerns. Specifically, they expressed reservations as to whether the project was consistent with the FLUM, whether it was congruent with the Brookland/CUA SAP,[9] and what its impact would be on the surrounding community. Commission Vice Chairman Konrad Schlater was especially

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[8] FAR is "a figure that expresses the total gross floor area as a multiple of the area of the lot. This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot." 11 DCMR § 199.1 (2012).

[9] SAPs are part of the Comprehensive Plan itself, but apply only to particular geographic areas. 10-A DCMR § 2503.1 (1994).

concerned with OP's failure to include copies of the FLUM or GPM in its report, telling OP's representatives that "[w]e need to see [the GPM and FLUM]. Otherwise, we're flying blind, so to speak." Accordingly, the Commission chose not to schedule a formal public hearing, but instead asked OP to supplement its report with additional analysis regarding the SAP, FLUM, and GPM.

The Commission held a second hearing on July 25, 2011, to consider OP's revised report. That report contained a blown-up version of the FLUM, and indicated that "just over half" of the property was approved for moderate-density mixed uses. It also contained a reproduction of the GPM. As to the SAP, OP noted that "[t]here are elements . . . that support development of the site as an important link between the new commercial uses that will be developed at [a recently-approved PUD project on Catholic University's campus] and the existing commercial uses on 12th Street." It also pointed to the existence of other, competing policies, which stressed conserving the local neighborhood's residential character. Ultimately, OP reiterated its conclusion that the developer's proposal struck an appropriate balance between these competing policies. After considering this new report, the developer's own supplemental submissions, and OP's testimony, the Commission scheduled the proposal for a public hearing.

Before the public hearing, OP submitted a third report, again concluding that the project was not inconsistent with the Comprehensive Plan as a whole. It reiterated its position that the FLUM designated "much of the site [as] suitable for mixed residential and commercial use." OP acknowledged that the developer's proposal would extend mixed commercial-residential uses into what was then a low-density residential area, but concluded that the proposal was nevertheless consistent with the FLUM "for the majority of the applicant's site."

The Commission held two days of public hearings on January 19 and February 2, 2012. During these hearings, the Commission heard testimony for and against the developer's proposal. Members of the local Advisory Neighborhood Committee, the District Department of Transportation, and OP testified in favor of the project. In opposition, the 200-Footers urged the Commission to reject the proposal. They raised a variety of concerns, claiming that the proposal amounted to a *de facto* extension of Catholic University's campus, that the developer could have adjusted its proposal to fit a less-intensive zoning designation, and that the developer's efforts to engage the community were inadequate.

Most significantly, the 200-Footers asserted that the proposal was inconsistent with the Comprehensive Plan. Specifically, they claimed that the

proposed project was contrary to the Plan's Land Use, Upper Northeast Area, and Urban Design Elements. They also argued that the proposal was inconsistent with the FLUM, and they alleged that OP misrepresented the FLUM in its reports. The petitioners submitted their own FLUM reproduction, and on the basis of that reproduction, they asserted that more than half of the property was actually reserved for low-density residential uses.[10] At the close of the hearing, the Commission again requested more information from OP, asking that Office to explain in greater detail why the proposal was not inconsistent with the Comprehensive Plan as a whole.

On February 23, 2012, OP submitted another supplemental report, in which it addressed the question whether the proposal was consistent with the GPM, FLUM, and Brookland/CUA SAP. First, OP explained that the GPM must be interpreted in conjunction with the Plan's written elements, including the Land Use Element. Second, OP noted that the FLUM merely established general development patterns, not parcel-specific zoning guidelines. Third, OP recognized that the SAP contemplated that new developments would not exceed five stories in

[10] Specifically, they claimed that the FLUM approved only 37.5% of the property for mixed-use development, reserving the remainder for low-density residential use. In contrast, OP stated in its report that "[a] majority of the applicant's site is shown as appropriate for moderate[-]density mixed uses."

height. Nevertheless, because the PUD regulations explicitly empowered the Commission to approve more intense development than would be allowed under as-of-right zoning, OP believed that the proposal was not necessarily inconsistent with the SAP.

Ultimately, the Commission unanimously approved the developer's application. In a forty-four page order, issued on June 8, 2012, the Commission concluded that the proposal would not, as a whole, be inconsistent with the Plan.[11] In particular, the Commission focused on the Plan's Upper Northeast and Land Use Elements. The Commission noted that the Upper Northeast Element encouraged moderate-density mixed-use development, and that current zoning was inconsistent with that goal. The requested rezoning, the Commission found, would bring the property in line. As to the Land Use Element, the Commission pointed out that at least one land-use policy endorsed the use of Metro stations as development anchors. The developer's proposal would advance this policy, in the

[11] The Commission also rejected the petitioners' claim that the developer failed to reach out to the community or to take account of local concerns. The developer held at least four community-outreach meetings before submitting its application, and at least two additional meetings after the public hearings. The Commission credited testimony to the effect that the developer incorporated the community input it gathered during these meetings into its final proposal. In particular, the Commission found that the developer "engaged the [petitioners] to create community amenities and an enhanced construction management agreement that serves the interests of both the [petitioners] and the [developer]."

Commission's view, because it was the area's "most realistic development opportunity."

The Commission also found that the proposal "fully achieve[d] the goals outlined" in the Brookland/CUA SAP. Specifically, it concluded that the proposal would promote "[m]ixed-use development with community-serving retail" along Monroe Street. And while the Commission recognized that the project would exceed the SAP's fifty-foot height limit, it concluded that the project's proposed setbacks would render it "roughly equivalent" to a typical fifty-foot structure.

In regard to the FLUM, the Commission found that the map approved "over one-half" of the property for moderate-density mixed uses. It recognized that the proposal would extend commercial development into an area the FLUM reserved for low-density residential use, but reasoned that the FLUM was "not a zoning map and does not specify allowable uses or dimensional standards." Thus, viewing the proposal in the context of the Comprehensive Plan "as a whole," the Commission found it to be consistent with the FLUM.

II.

Before this court, the petitioners raise two chief arguments. First, they claim that on its face, the developer's proposal was irreconcilable with the Comprehensive Plan, and that the Commission therefore had no authority to approve the developer's application. They ask that we reverse the Commission's decision outright and order that the application be denied. Second, they argue that even if the developer's proposal was consistent with the Plan – and they insist that it was not – the Commission failed to make adequate findings as to several material contested issues. We address these contentions in turn.

A.

In the District of Columbia, the Zoning Commission has the exclusive authority to enact zoning regulations, and it has the principal responsibility for assuring that those regulations are not inconsistent with the Comprehensive Plan. D.C. Code §§ 6–621.01 (e), -641.01 (2008); *Foggy Bottom Ass'n v. District of Columbia Zoning Comm'n*, 979 A.2d 1160, 1167 (D.C. 2009); *Tenley & Cleveland Park Emergency Comm. v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 341 (D.C. 1988). Because of the Commission's statutory role and subject-matter expertise, we generally defer to the Commission's interpretation of the zoning regulations and their relationship to the Plan. *See Watergate E. Comm.*

Against Hotel Conversion to Co-op Apartments v. District of Columbia Zoning Comm'n, 953 A.2d 1036, 1042 (D.C. 2008) (quoting *Cathedral Park Condo. Comm. v. District of Columbia Zoning Comm'n*, 743 A.2d 1231, 1239 (D.C. 2000)); *1330 Conn. Ave., Inc. v. District of Columbia Zoning Comm'n*, 669 A.2d 708, 714 (D.C. 1995) ("This court defers to the interpretation by the agency of its own regulations 'unless plainly erroneous or inconsistent with the regulations.'" (quoting *Smith v. District of Columbia Bd. of Zoning Adjustment*, 342 A.2d 356, 360 (D.C. 1975))).

As a result, in cases such as the present one, our review of the Commission's decision is deferential. *See Wis.-Newark Neighborhood Coal. v. District of Columbia Zoning Comm'n*, 33 A.3d 382, 388 (D.C. 2011). It is not this court's role to "determine whether a particular zoning action is, or is not, desirable." *Watergate, supra*, 953 A.2d at 1042; *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 355 A.2d 550, 560 (D.C. 1976). Rather, we must affirm the Commission's decision so long as (1) it has made findings of fact on each material contested issue; (2) there is substantial evidence in the record to support each finding; and (3) its conclusions of law follow rationally from those findings. *Watergate*, 953 A.2d at 1042 (quoting *Cathedral Park, supra*, 743 A.2d at 1239); *see also Wis.-Newark, supra*, 33 A.3d at 388; *Hotel Tabard Inn v.*

District of Columbia Dep't of Consumer & Regulatory Affairs, 747 A.2d 1168, 1173 (D.C. 2000)). In other words, so long as the Commission makes adequate findings, we will not "substitute [our] judgment for that of the [agency]." *Watergate, supra*, 953 A.2d at 1043 (quoting *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 52 (D.C. 1984) (en banc)) (internal quotation marks omitted).

In addition to its authority to enact and amend zoning regulations, the Commission presides over the PUD process. Through this process, the Commission may provide an applicant with some flexibility, e.g., by permitting increased building height and density, in order to allow communities to be developed as a coherent whole, *Wis.-Newark, supra*, 33 A.3d at 391 (quoting *Watergate, supra*, 953 A.2d at 1040), provided "that the project offers a commendable number or quality of public benefits and that it protects and advances the public health, safety, welfare, and convenience." 11 DCMR § 2400.2 (2001). Key to this process is the Commission's authority to consider zoning amendments which may be necessary to accommodate a particular PUD proposal. *See* 11 DCMR § 2406.2 (2000). The Commission may not, however, use this process to approve a project or rezone an area in a manner inconsistent with the Comprehensive Plan, or with any "other adopted public policies and active

programs related to the subject site." 11 DCMR § 2403.4 (2006); *see also* D.C. Code § 6-641.02 (2008).

B.

We reject the petitioners' claim that the proposal approved by the Commission is invalid on its face as irreconcilable with the Comprehensive Plan. It is the Commission that is responsible for balancing the Plan's occasionally competing policies and goals, subject only to deferential review by this court. *See Tenley & Cleveland Park, supra*, 550 A.2d at 341 ("[T]he Zoning Commission is the exclusive agency vested with responsibility for assuring that the zoning regulations are not inconsistent with the Comprehensive Plan."). Where the Commission has fully addressed the applicable aspects, policies, and material issues regarding the Plan, this court will not substitute its own judgment for that of the Commission. *See Watergate, supra*, 953 A.2d at 1043 ("[T]he mere existence of substantial evidence contrary to [the Commission's findings] does not allow this court to substitute its judgment for that of the [Commission]."); *Rock Creek E. Neighborhood League v. District of Columbia Zoning Comm'n*, 388 A.2d 450, 451 (D.C. 1978) ("Absent arbitrary and capricious action, we will not substitute our judgment for that of the Zoning Commission.").

Moreover, even if a proposal conflicts with one or more individual policies associated with the Comprehensive Plan, this does not, in and of itself, preclude the Commission from concluding that the action would be consistent with the Comprehensive Plan as a whole. *Cf. Blagden Alley Ass'n v. District of Columbia Zoning Comm'n*, 590 A.2d 139, 147 (D.C. 1991) (remanding for further consideration, rather than reversing, where the Commission did not provide "any discussion" of an apparently conflicting policy). The Plan is not a code of prohibitions; it is an interpretive guide, which the Commission must consider holistically. It provides a broad "*statement of policy to guide future public decision*[-]*making*." *Tenley & Cleveland Park, supra*, 550 A.2d at 338 (quoting Report of the Committee of the Whole on Bill 5-282, District of Columbia Comprehensive Plan Act of 1984 (Jan. 17, 1984)) (emphasis in original) (internal quotation marks omitted). And "[a]lthough the Plan serves as an important policy guide, its legal mandate is more limited." *Id.* Except where specifically provided, the Plan is not "binding"; it is only an interpretive tool. *Id.* Its discrete elements "guide[,] but do not direct" the Commission's action, and it "do[es] not impose specific implementation techniques." *Id.* at 338–39. Accordingly, that some individual policies may be facially at odds with a particular zoning action is not

necessarily dispositive; the Commission must still determine whether a proposed action would be consistent with the Plan as a whole.

C.

We agree with the petitioners, however, that in this case the Commission did not resolve all of the outstanding material issues.[12] During the public hearings, the

[12] Although we agree with the petitioners that in this case, the Commission did not resolve all of the outstanding material issues, and notwithstanding the fact that some of the Commission's findings challenged by the petitioners appear to have been based entirely on proposed findings submitted by the developer (not an infrequent practice of courts and agencies), we reject the petitioners' implicit characterization of the Commission's decision as partisan, biased, or as having been made in bad faith. In its lengthy order, the Commission made some apparent errors and omissions, but it did not, as the petitioners assert, display a "cavalier disregard" of its responsibility to interpret and implement, objectively and fairly, the record before it or the Comprehensive Plan.

Over the course of the proceedings, the Commission paid close attention to the question whether the proposal was consistent with the Comprehensive Plan. For example, although OP offered its opinion — on multiple occasions — that the developer's application was consistent with the Plan, the Commission did not reflexively accept OP's submissions at face value. Rather, after receiving OP's initial report, at least three members of the Commission expressed concerns regarding the application's consistency with the Plan and its accompanying policy maps. Because of these concerns, the Commission delayed scheduling a public hearing on the application, and asked OP to supplement its report with additional explanation and analysis.

(continued...)